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Supreme Court, U.S.
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No. 95-123

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

R. WILLIAM GRAHAM,
Petitioner,

v.

MARCIA J. MENGEL,
Clerk of the Supreme Court of Ohio
and Secretary of the Board of Bar Examiners, et al.,
Respondents.

BRIEF IN OPPOSITION TO
A PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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I

THE QUESTION PRESENTED

Whether the Ohio Court of Claims erred in all three of the following respects:

(1) determining pursuant to Ohio law that it was without jurisdiction to consider the Petitioner's constitutional claims; (2) applying the doctrine of judicial immunity with respect to any and all damage claims of the Petitioner; and (3) making the factual determination that the Respondents' conduct did not rise to the level of negligence (or lack of professional judgment) and did not proximately cause Petitioner's harm.

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R. WILLIAM GRAHAM
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MARCIA J. MENGEL, Clerk of the Supreme Court of Ohio and Secretary of the Board of Bar Examiners, et al.,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

OPINIONS BELOW

Respondent's Appendix B is the Supreme Court of Ohio's April 21, 1992 dismissal of the Petitioner's second lawsuit to the extent he sought damages and injunctive relief.

Respondent's Appendix C is this Court's December 6, 1993 second denial of the Petitioner's writ of certiorari.

Finally, Appendix D sets forth the Court of Claims' May 14, 1992 pre-screening entry. The remaining opinions are adequately set forth in the Petitioner's Brief.

STATEMENT OF THE CASE

A. Procedural Posture

R. William Graham, the sole Petitioner, failed the July, 1990 Ohio Bar Examination. He and two other unsuccessful applicants, who have subsequently re-taken and passed the bar examination and have not joined in this action, filed a lawsuit which was dismissed by the United States District Court for the Southern District of Ohio on February 19, 1992, for lack of subject matter jurisdiction. (Petitioner's Appendix I). The United States Court of Appeals for the Sixth Circuit affirmed this decision in an unpublished decision on February 3, 1993. (Petitioner's Appendix H). This Court denied certiorari for the first time on June 21, 1993. (Petitioner's Appendix G).

In the meantime, Graham filed a second lawsuit in the Supreme Court of Ohio, allegedly under that Court's original jurisdiction. The Ohio Supreme Court on April 21, 1992, entered an order dismissing the Complaint to the extent that it sought damages and injunctive relief, which are outside of that Court's jurisdiction. (Respondents' Appendix B). While the Court dismissed the individual Defendants from the case, it initially retained the remainder of the Complaint as an application to exercise its original jurisdiction over the admission to practice law and to render a declaratory judgment with regard to the constitutionality of the procedures followed in connection with the July, 1990 Ohio Bar Examination. (Respondents' Appendix B). Subsequently, the Ohio Supreme Court dismissed that case sua sponte for want of jurisdiction. (Petitioner's Appendix E). This Court again denied certiorari on December 6, 1993. (Respondents' Exhibit C).

The Petitioner filed a third Complaint in the Ohio Court of Claims on May 8, 1992, against the Clerk of the

Ohio Supreme Court, in her capacities as clerk and secretary of the board, the justices of the Ohio Supreme Court, individually and in their official capacities, and the members of the Board of Bar Examiners, individually and in their official capacities. The Court of Claims dismissed the individual Defendants pursuant to §2743.02 on May 14, 1992, and the Petitioner has not appealed this dismissal. (Respondents' Appendix D). The Court entered its summary judgment decision in favor of the remaining Defendants on February 18, 1994. (Petitioner's Appendix C). The Court of Appeals for Franklin County affirmed this decision on September 15, 1994. (Petitioner's Appendix B). The Ohio Supreme Court denied further review of this matter on April 25, 1995. (Petitioner's Appendix A).

B. Statement of Facts

The relevant facts in this case have been set forth both by the Court of Claims and by the District Court. (Petitioner's Appendices C & I). The fact which the Petitioner finds upsetting is that one of the twelve bar examiners was more stringent than the other eleven. (R. William Graham at Tr. 29-30, 37-39, 47-49).

It was unequivocally established before the District Court that the examiner in question was conscientious in his grading, that he carefully and thoughtfully exercised his professional judgment in his performance of his assigned tasks, that he gave high grades to the same applicants who received high grades from other examiners, that he gave low grades to the same applicants who received low grades from other examiners (Tr. 142, 144), that he had an impressive professional background and extensive experience in evaluating basic legal skills as expressed in the written work of young lawyers (Tr. 186-187), that he articulated and consistently applied an intelligent set of criteria for evaluating the essays he was assigned to grade (Tr. 194-196), and that he devoted 125 hours of his life and professional judgment to his assigned task. (Tr. 196). It was also established that every successful applicant who did not obtain a shortcut to success through the presumptive pass phase of the examination had his or her examination efforts subjected to precisely the same scrutiny from the examiner in question as were the Petitioner's efforts. (Tr. 144). Based upon the submission of these and other facts, the Court of Claims concluded that "Defendants did not act negligently and the Defendants' acts or omissions did not proximately cause Plaintiff's harms." (Petitioner's Appendix C at 7). Both the District Court and the Court of Claims also determined that the Ohio Supreme Court had made discretionary decisions and that the examiner in question zealously exercised his professional judgment. (Petitioner's

Appendix I at 11; Petitioner's Appendix C at 16).

Despite at least eight opportunities, the Petitioner has refused to pursue the always available remedy of re-taking the bar examination. Instead he has filed his third Petition for Writ of Certiorari to this Court.

SUMMARY OF THE ARGUMENT

The Ohio Court of Claims granted summary judgment in favor of the Defendants on the basis of judicial immunity and upon a determination that the Respondents' conduct neither rose to the level of negligence (or lack of professional judgment), nor constituted the proximate cause of the Petitioner's injuries. The Court held that pursuant to the Ohio Revised Code it was without subject matter jurisdiction to review the Petitioner's due process claims. This Court should defer to that Court's interpretation of Ohio law.

ARGUMENT

This case presents no constitutional questions. In granting summary judgment, the Court of Claims correctly noted that it did not have jurisdiction to rule on constitutional questions.

The Ohio Legislature abrogated its immunity and provided that the State may be liable in the Court of Claims "in accordance with the same rules of law applicable to suits between private parties." **Ohio Revised Code** §2743.02(A)(1). Ohio courts have consistently adhered to the legislature's mandate and have refused to rule on constitutional questions when they are presented in the Court of Claims. E.g., Thompson v. Southern State Community College, No. 89AP-114, (10th Dist. June 15, 1989). Similarly, the Court correctly noted that the Respondents' Section 1983 and 1985 claims may not be brought against the state in the Court of Claims. Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989); Burkey v. Southern Ohio Correctional Facility, 38 Ohio St.3d 170 (1988).

Even if the Petitioner were entitled to bring his constitutional claims initially in the Court of Claims, the Court still properly granted summary judgment on two independent grounds. First, the Court of Claims properly noted that the Respondents were entitled to summary judgment on the basis of judicial immunity. The United States District Court for the Southern District of Ohio granted judgment in favor of the Respondents because it held that "the decision to deny [plaintiff]'s admission to the bar based upon [his] grades in the bar examination were judicial decisions made in judicial proceedings." (Petitioner's Appendix I at 24). In fact, both state and federal Courts of Appeals have applied the doctrine of judicial immunity to bar the precise kinds of claims that are

at issue in this case. Sparks v. Character & Fitness Committee of Ky., 859 F.2d 428, cert. denied, 489 U.S. 1011 (1988); Hampton v. Tennessee Bd. of Law Examiners, 770 S.W. 2d 755, 757 (1989).

Finally, the Court of Claims made a well-reasoned and careful analysis of the facts and noted that "while the presumptive pass rule certainly served to focus the energies of the bar examiners more closely upon certain applicants, it was Plaintiff's total performance that determined whether he passed or failed." (Petitioner's Exhibit C at 14). Perhaps the merits of the matter were best summed up by the Franklin County Court of Appeals as follows:

> Even if we construe the foregoing in favor of Plaintiff, we are unable to conclude that Plaintiff has demonstrated a genuine issue of material fact concerning a violation of his due process rights. While the District Court's findings may suggest that the Defendant could have better instructed the individual bar examiners regarding a uniform approach to grading the bar examination essays, the evidence fails to support Plaintiff's contentions that Defendants' failure to so instruct is tantamount to a lack of professional judgment and renders the examination results unrelated to Plaintiff's ability to practice law, especially given the findings that the individual examiner Plaintiff contends to be at fault was found to have exercised his professional judgment.

(Petitioner's Appendix B at 14).

CONCLUSION

This case presents no federal constitutional issue for this Court's consideration since the Ohio Court of Claims was without jurisdiction to consider any such issue. This Court should defer to the Court of Claims' findings with respect to both judicial immunity and lack of evidence of inappropriate conduct on the part of the Respondents.

For these reasons, the Petitioner's Writ of Certiorari should be denied.

Respectfully submitted,

By: /s/ DAVID C. GREER
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APPENDIX A

OHIO REVISED CODE

§ 2743.02 State waives immunity from liability.

(A)(1) The State hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter and, in the case of state universities or colleges, in section 3345.40 of the Revised Code, and except as provided in division (A)(2) of this section. To the extent that the state has previously consented to be sued, this chapter has no applicability.

Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any officer or employee, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

APPENDIX B

IN THE SUPREME COURT OF OHIO

R. William Graham, Plaintiff,	)	1992 TERM
	)	CASE NO. 92-566
v.	)	
Marcia J. Mengel, et al Defendants.	)	**ENTRY**
	)	To Wit: April 21, 1992

This cause originated in this Court on the filing of a complaint for damages, declaratory and injunctive relief. Upon consideration thereof,

IT IS ORDERED by the Court, sua sponte, that this cause is dismissed to the extent that the complaint seeks damages and injunctive relief, both of which are outside the jurisdiction of this Court, and that the defendants are thereby also dismissed.

IT IS FURTHER ORDERED by this Court that the remainder of the complaint shall be retained and considered an application under the Ohio Constitution, Article IV, Section 2(B)(1)(g), for this Court to exercise its original jurisdiction over admission to the practice of law and to render a declaratory judgment with regard to the constitutionality of procedures followed in connection

with the July 1990 Ohio Bar Association.

IT IS FURTHER ORDERED that plaintiff shall file his brief on the merits on or before May 21, 1992.

/s/ A. WILLIAM SWEENEY
Acting Chief Justice

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

December 6, 1993

Mr. David C. Greer
400 Gem Plaza
Third & Main Streets
Dayton, Ohio 45402

Re: R. William Graham
v. Marcia J. Mengel, Clerk, Supreme Court of Ohio and Secretary of the Board of Bar Examiners, et al.
No. 93-619

Dear Mr. Greer:

The Court today entered the following order in the above entitled case:

The Petition for a writ of certiorari is DENIED.

Very truly yours,

/s/ WILLIAM K. SUTER,
Clerk

APPENDIX D

IN THE COURT OF CLAIMS OF OHIO

R. William Graham, Plaintiff,	)	
	)	CASE NO. 92-05187
v.	)	
The Ohio Board of Bar Examiners, et al. Defendants.	)	**PRE-SCREENING ENTRY**

This case came to the court's attention in accordance with L.C.C.R. 15(B).

Under R.C. 2743.02(E), only state agencies and instrumentalities can be defendants in original actions in the Court of Claims. Accordingly, Marcia J. Mengel, Clerk and Secretary of The Supreme Court of Ohio, Members of The Supreme Court of Ohio, individually and in their official capacities, Thomas J. Moyer, A. William Sweeney, Robert E. Holmes, Andy Douglas, J. Craig Wright, Herbert R. Brown and Alice Robie Resnick, Members of the State of Ohio Board of Bar Examiners, individually and in their official capacities, Michael L. Gordon, Indra K. Shah, Leslie W. Jacobs, Phillip J. Campanella, Keith McNamara, James F. DeLeone, Larry H. James, Katheleen M. Trafford, Alan C. Travis,

Frederick Byers, John A. Harris, III and Theodore G. Gudorf are dismissed as parties in this action.

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/s/ _____

Case No. 92-05187 **ENTRY**

The caption of this case shall henceforth read as set out above.

It is further ordered that the plaintiff's demand for a jury trial be dismissed in accordance with R.C. 2743.11.

/s/ _____
Judge

Entry cc:

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BY /s/ _____